IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b))

Description of case

Wr.P.No. 729 of 2001(M/B), decided on 25.10.2002

MC Dermott International Inc

Vs.

Addl. Commissioner Income Tax

A.F.R. (Approved for reporting)
~~Not approved for reporting~~

Date 25.10.2002

Initials of Judge

Note- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

RESERVED

Writ Petition No. 729 of 2001

McDermott International Inc.
Panama ……. Petitioner
Versus

Additional Commissioner of Income Tax,
Special Range, Dehradun
and another. ……. Respondents
.....

Hon. A.A.Desai, C.J.
Hon. Irshad Hussain, J.

(Delivered by Hon'ble A.A.Desai, C.J.)

This petition by an assessee is directed against notices(marked as Annexure- 'I', 'P', 'U, 'Z' and 'AE') purported to have been issued under section 147 read with section 148 of the Income Tax Act, 1961 (hereinafter referred to as the Act). They have been impugned principally on the ground that they suffer serious legal infirmity since issued after expiry of four years from the end of the relevant assessment years, even in absence of the condition or conditions as envisaged by proviso to section 147 of the Act.

2. To appreciate the challenge relevant facts are thus:

The petitioner is a Limited Foreign Company incorporated under the Municipal Laws of Panama. The company has been engaged inter alia in designing, fabricating, construction, installation as a sub-contractor of various contractors of Oil and Natural Gas Commission (India). The petitioner company pursuant to section 139 of the Act submitted returns for the assessment year 1989-90, 1990-91, 1991-92, 1993-94 and 1994-95. The company thereunder offered 1% of the gross receipts of the work done outside of India as an income for assessment. The respondent Authority assessed the total income for the relevant years and determined the sum payable by the Assessee under section 143(3) of the Act. The respondent assessing officer(Additional Commissioner of Income Tax, Dehradun) thereafter on 30.03.2000 issued the impugned notice for the assessment year 1989-1990 and on 29.03.2001 for assessment years 1990-1991, 1991-1992,

1993-1994 and 1994-1995, for reassessment, on the belief that the income of the company has escaped assessment.

3. Inviting our attention to Proviso to section 147 of the Act, learned counsel for the petitioner urged that apparently the notices are issued beyond the period of four years as prescribed. Such re-opening of the assessment would, therefore, be permissible, only when there is failure on the part of the Assessee. And there has been no such failure which could be attributable to the Assessee. Even the impugned notices didn't indicate any failure or omission on the part of the assessee.

4. To appreciate the ground of challenge, it would be beneficial to reproduce section 147 and the proviso:

> "If the Assessment Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of section 148 to 153, assess or reassess such income and also any other income chargeable to tax which has excaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recomputed the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in section 148 to 153 referred to as the relevant assessment year):
>
> **Provided** that where an assessment under sub-section(3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section(1) of section 143 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year. (Emphasis supplied by us).

Explicit it is from the proviso that it renders complete support to the ground as raised by the Assessee.

5. Mr. S. K.Posti, learned counsel for the respondents, attempted to sustain the validity of the impugned notices, by relying on section 151 of the Act and made a submission that if the notices in question are issued after

expiry of four years, the permission of the Commissioner is necessary. And the Commissioner has accorded such permission/sanction and, therefore, the impugned notices are valid.

The submission is devoid of substance. Sanction to issue notices u/s 151 of the Act is merely a safeguard so as the assessee need not be unnecessarily harassed by the Assessing Officer. However, grant of such sanction/permission doesn't dispense with the conditions as mandated by proviso to section 147, which according to us are imperative.

6. Mr. Posti, then urged that for a non-resident company like the petitioner the income is assessable to 10% of gross receipt for the work done outside of India, as envisaged by section 44BB. With the assistance of the learned counsel, we have perused the provision. These provisions were on the statute book since 1983. It is thus clear that it was open and permissible for the assessing authority to assess 10% of the gross receipt instead of 1% as offered by the assessee. It is the failure or omission on the part of the assessing authority, which does not lead in any manner to constitute failure or omission on the part of the assessee entitling them to invoke section 147 of the Act, after prescribed period of four years.

7. Mr. Posti submitted that the Assessee has not disclosed the total income, but disclosed only 1% of gross income so far as work done outside of India is concerned. The Assessee has also not disclosed receipt on account of mobilization and demobolisation outside of the India income, which constituted the income taxable @ 10% as such receipt. The assessment was done in respect of the work outside of India income @ 1% excluding the receipt on account of mobilization and demobilization outside India, this is a material fact suppressed by the Assessee in his Return.

8. The submission is far from facts. As recorded, the Assessee has offered 1% of the total receipt for the work outside India for assessment. The Assessee though took such a stand, the Assessing Authority was at

liberty to assess @ 10% of income. To calculate 10% of the income, the multiples of 1% were more convenient. This could not be in any manner a suppression as envisaged under the relevant provision.

9. More precisely, the respondent by communication dated 14.5.2001 indicated the basis for satisfaction to reopen the assessment under section 147 of the Act, as thus:

> "Assessment in this case was completed on 12.01.1993 on total income of Rs. 2,81,31,790/-. The income of NRC assessee was computed under the provisions of Sec. 44BB of IT Act'61. The assessee NRC has offered mob/demob as outside India receipts and was assessed at the deemed profit rate of 1% treating the same as outside India work. In view of the decision of Hon'ble ITAT in the case of ONGC as agent of M/s Nippon Kokan & Others in ITA No. 3413/D/88 and Sedco Forex Intl. Drilling Inc. in ITA No. 4562/D/91, the reimbursement on account of mob/demob is to be treated as inside India receipt as deemed profit rate of 10%.....
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> Keeping in view the above facts, the income chargeable to tax has been under assessed by an amount of Rs. 29 Lakhs. Therefore, I have reason to believe that income chargeable to tax has escaped assessment in view of Clause (c)of Explanation 2 to Sec. 147 of IT Act' 61."

Even the reasons as adopted by the Authority don't furnish any premises for the submission made by Mr. Posti. Moreover, the communication does not suggest even remotely, in any manner any failure or omission on the part of the assessee as envisaged by the proviso referred to above. On the contrary the Authority resorted to Explanation 2 to S. 147 of the Act.

10. Mr. Posti, then to sustain validity of impugned notices has placed reliance on clause(c) of Explanation 2 of Section 147 which reads thus:

Explanation 2.- For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:-

(c) Where an assessment has been made, but-

(i) income chargeable to tax has been under-assessed; or

(ii) such income has been assessed at too low a rate; or
(iii) such income has been made the subject of excessive relief under this Act; or
(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

The reliance is totally misplaced. The occasions as enumerated no doubt permit re-assessment within permissible period under section 147. However to carry re-assessment beyond a period of four years, conditions under the proviso need to be complied with.

11. According to learned counsel, the information as envisaged under Explanation would also be decision of superior authorities and includes true and correct state of law and also information as to judicial decision. He sought to support his proposition by citing various authorities. We need not discuss the case laws, even accepting the position of law as an information for re-opening of assessment. It could be for invoking the provisions under section 147 of the Act. Proviso to Section 147 of the Act as discussed cast exemplary burden for satisfaction that the assessment escaped only due to failure on the part of the Assessee for the contingency either of the description. In our view, information relating to the position of law available through the verdict of the higher authority could not be such failure on the part of the Assessee which authorities the Assessing Authority to reopen the assessment.

12. Moreover, the view of the Apex Tribunal on which the assessing authority has relied, has merely endorsed the position of law as expressly incorporated under section 44BB. It could not be treated as change in view or approach so as to give occasion for the Assessing Officer who has a reason to believe as contemplated by section 147. If there was any erroneous or improper approach in assessment under section 143 of the Act, then certainly it couldn't be failure on the count of the Assessee. The company sought support to the submission from the view expressed by the Supreme Court in the Case of *Commissioner of Income Tax, Gujrat Vs. Bhanji Lavji, 79 ITR 582* that section 34(1)(a)[analogous to section 147 as

reproduced above] does not cast any duty upon the assessee to instruct the Income Tax Officer on the question of law.

The Supreme Court in the same case having regard to the facts further observed that the Income-tax Officer was apprised of all the primary facts necessary for assessment, and he proceeded to "drop the assessment proceedings". He may have raised a wrong legal inference from the facts disclosed but on that account he was not competent to commence reassessment proceedings under section 34(1)(a) for the two assessment years 1947-48 and 1948-49.

13. Mr. Posti then relying on a decision in *Central India Industries Ltd. Vs. Income-Tax Officers and others* reported in 184 I.T.R. 242 urged that Writ Court will not sit in appeal over each and every order of statutory authority unless the order is perverse in nature causing manifest injustice. We do not propose to do so , but the authority for them flows only from statutory scheme and if the statute does not permit, the exercise will be manifestly illegal leading to substantial failure of justice. He then tried to urge that Writ Court can not assess sufficiency of the ground or reasons, to believe as envisaged under section 147. The submission of the learned counsel is devoid of merit for this reason that the reason or ground for re-opening of assessment in terms of proviso to section 147 are totally non-existent. According to our reasoning, we have addressed only the absence of ground and the sufficiency.

14. Learned counsel for the respondents could not satisfy that there was any failure on the part of the assessee as envisaged by the proviso to Section 147 or in any manner by suppression or omission, he took advantage and escaped the assessment.

In the result, we allow the petition and quash the impugned notices dated 30.03.2000 and 29.03.2001.

(Irshad Hussain, J.) **(A.A. Desai, C.J.)**

Dt. October 25, 2002.

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